

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In re

**MARITIME COMMUNICATIONS/LAND
MOBILE, LLC**

Participant in Auction No. 61 and Licensee of
Various Authorizations in the Wireless Radio
Services

Applicant for Modification of Various
Authorizations in the Wireless Radio Services

Applicant with **ENCANA OIL AND GAS (USA),
INC.; DUQUESNE LIGHT COMPANY; DCP
MIDSTREAM, LP; JACKSON COUNTY
RURAL MEMBERSHIP ELECTRIC
COOPERATIVE; PUGET SOUND ENERGY,
INC.; ENBRIDGE ENERGY COMPANY,
INC.; INTERSTATE POWER AND LIGHT
COMPANY; WISCONSIN POWER AND
LIGHT COMPANY; DIXIE ELECTRIC
MEMBERSHIP CORPORATION, INC.;
ATLAS PIPELINE – MID CONTINENT, LLC;
DENTON COUNTY ELECTRIC
COOPERATIVE, INC., DBA COSERV
ELECTRIC; AND SOUTHERN CALIFORNIA
REGIONAL RAIL AUTHORITY**

EB Docket No. 11-71
File No. EB-09-IH-1751
FRN: 0013587779

Application File Nos. 0004030479,
0004144435, 0004193028, 0004193328,
0004354053, 0004309872, 0004310060,
0004314903, 0004315013, 0004430505,
0004417199, 0004419431, 0004422320,
0004422329, 0004507921, 0004153701,
0004526264, 0004636537,
and 0004604962

To: Marlene H. Dortch, Secretary
Attention: Chief Administrative Law Judge Richard L. Sippel

**ENFORCEMENT BUREAU'S OPPOSITION TO EVH'S MOTION TO STRIKE
AND RESPONSE TO EVH'S OBJECTIONS TO THE BUREAU'S
DIRECT CASE TESTIMONY AND EXHIBITS**

1. Pursuant to *Orders*, FCC 14M-27,¹ and FCC 14M-32,² the parties were directed to submit, by noon on October 29, 2014, their written objections to direct case exhibits and/or

¹ See *Order*, FCC 14M-27 (ALJ, rel. Aug. 21, 2014).

² See *Order*, FCC 14M-32 (ALJ, rel. Oct. 9, 2014).

written direct testimony. In lieu of filing specific objections under the Federal Rules of Evidence³ to direct case exhibits and written direct testimony, Environmental, LLC, Verde Systems, LLC and Mr. Havens (collectively, EVH) instead filed a baseless motion to strike all of the Enforcement Bureau's (Bureau) direct case exhibits and written direct testimony – several parts of which, as explained below, *EVH has never reviewed*.⁴ For the reasons set forth below, EVH's objections and motion to strike should be denied, and the Bureau's direct case should be admitted in its entirety.

EVH'S Motion Is An Abuse Of Process

2. In *Order*, FCC 14M-25, the Presiding Judge specifically cautioned EVH that pursuant to Section 1.52 of the Commission's rules, "the signature of an attorney 'constitutes a certificate by him that he has read the document; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay.'"⁵ Yet, as demonstrated below, EVH's Motion offers no "good ground to support it." Indeed, EVH cites no Commission rules or precedent that supports the unfounded accusations it has launched at the Bureau in its Motion. Instead, EVH's Motion is nothing more than its latest attempt to flood the record concerning its dissatisfaction with how the Bureau has, as discussed below, legitimately presented its direct case.⁶ EVH's repetitive belaboring of arguments for which it has no legal authority is an abuse of process. On this basis alone, EVH's Motion should be denied.

³ 47 C.F.R. § 1.351 (providing in relevant part that "[e]xcept as otherwise provided in this subpart, the rules of evidence governing civil proceedings in matters not involving trial by jury in the courts of the United States shall govern formal hearings").

⁴ See ENL-VSL Objections to Direct Case Testimony and Exhibits and Motion to Strike, filed Oct. 28, 2014 (EVH Motion). Mr. Havens joined this pleading.

⁵ *Order*, FCC 14M-25 (ALJ, rel. Aug. 11, 2014) at 3-4 (quoting 47 C.F.R. § 1.52).

⁶ See, e.g., Transcript of the October 1, 2014 Prehearing Conference at 9-1133-1135, 9-1141; ENL-VSL List of Witnesses With Explanations, filed October 10, 2014, at 4, 9.

**The Bureau Did Not Fail To Comply With The HDO,
The Commission's Rules, Or The Communications Act**

3. EVH argues that the Bureau's entire direct case should be stricken from the record because the Bureau has failed to comply with a presumed obligation pursuant to the Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing (HDO)⁷ to oppose Maritime Communications/Land Mobile, LLC (Maritime) with regard to *all* of the licenses implicated by Issue (g).⁸ This argument is simply incorrect.

4. With regard to Issue (g), the HDO placed upon the Bureau the burden of proof to demonstrate: (a) *whether* 169 site-based facilities licensed to Maritime were constructed within two years of their grant, as required by Section 80.49(a)(3) of the Commission's rules; and (b) *whether* operations of any of these site-based facilities had been permanently discontinued pursuant to Section 1.955(a) of the Commission's rules.⁹ The HDO did not impose any obligation upon the Bureau to reach a particular conclusion in response to these inquiries. In addition, EVH cites no Commission rule or precedent suggesting that the Bureau was obligated to conclude that Maritime's site-based facilities were not timely constructed or that operations at these facilities were permanently discontinued. Rather, the Bureau retained prosecutorial discretion to develop through discovery a comprehensive record on Issue (g) and, *taking into consideration that factual record and the Commission's precedent*, to present its case for hearing. EVH offers no basis for the Presiding Judge to decide otherwise.

The Bureau Did Not Fail To Comply With The Summary Decision Order

5. After considering the evidentiary record that the Bureau developed on Issue (g)

⁷ See *Maritime Communications/Land Mobile, LLC*, Order to Show Cause, Hearing Designation Order, and Notice of Opportunity for Hearing, EB Docket No. 11-71, 26 FCC Rcd 6520 (2011) (HDO).

⁸ See, e.g., EVH Motion at 2-3, 5-8.

⁹ See HDO at ¶ 62(g).

through its review of thousands of pages of documents and responses to multiple sets of interrogatories served on Maritime and its lessees, through its depositions of Maritime's principals and employees, and its review of the record developed before the U.S. Bankruptcy Court for the Northern District of Mississippi (Case No. 11-13463), the Bureau moved for summary decision as it pertained to 16 site-based facilities licensed to Maritime.¹⁰

6. The Presiding Judge granted summary decision on the timely construction aspect of Issue (g),¹¹ but denied summary decision on the permanent discontinuance aspect of Issue (g).¹² The Presiding Judge found that “[s]ignificant factual questions still need to be resolved as to whether service will resume at the licensed facilities [and] [f]or that reason, the taking of further evidence at hearing is necessary.”¹³

7. In light of the Presiding Judge's *Memorandum Opinion and Order*, the Bureau requested (and was granted) leave¹⁴ to take additional discovery from Maritime, its lessees, and other parties concerning the steps, if any, they were taking or planned to take “that are calculated to result in operations resuming at the licensed facilities.”¹⁵ The Bureau included this newly-

¹⁰ Maritime joined the Bureau's motion. See Joint Motion of Enforcement Bureau and Maritime for Summary Decision On Issue G, filed Dec. 2, 2013.

¹¹ See *Memorandum Opinion and Order*, FCC 14M-18 (ALJ, rel. Jun. 17, 2014) (*Memorandum Opinion and Order*) at 18, ¶ 50.

¹² See, e.g., *id.* at 22, ¶¶ 61 and 62.

¹³ *Id.* at 22, ¶ 61. See also *id.* at 20, ¶ 57 (recognizing that there remain substantial questions of material fact “regarding efforts to resume operations at 14 of the 16 facilities”). Although the Presiding Judge rejected the joint stipulations previously entered into between the Bureau and Maritime concerning an additional 153 site-based facilities, see *id.* at 25, ¶ 71, he later adopted a joint stipulation that the Bureau successfully negotiated with Maritime supporting the legal conclusion that operations at these 153 facilities had been permanently discontinued. See *Order*, FCC 14M-31 (ALJ, rel. Oct. 9, 2014).

¹⁴ See, e.g., *Order*, FCC 14M-22 (ALJ, rel. July 15, 2014).

¹⁵ *Memorandum Opinion and Order* at 22, ¶ 62. See, e.g., Enforcement Bureau's Interrogatories To Maritime Communications/Land Mobile, LLC Pursuant To *Order*, FCC 14M-22, served July 21, 2014; Enforcement Bureau's Interrogatories To Duquesne Light Company Pursuant To *Order*, FCC 14M-22, served July 21, 2014; Enforcement Bureau's Interrogatories To Choctaw Telecommunications, LLC and Choctaw Holdings, LLC Pursuant To *Order*, FCC 14M-22, served July 21, 2014; Enforcement Bureau's Interrogatories To Pinnacle Wireless, Inc. Pursuant To *Order*, FCC 14M-22, served July 21, 2014; Enforcement Bureau's Interrogatories To Puget Sound Energy, Inc. Pursuant To *Order*, FCC 14M-22, served July 21, 2014.

obtained information as part of its direct case.¹⁶ Nevertheless, EVH wrongly accuses the Bureau of failing to comply with the Presiding Judge's *Memorandum Opinion and Order* on summary decision.

8. EVH premises this baseless accusation on the Bureau's purported failure to offer "documentation, testimony, cross-examination, or expert opinion" that opposes Maritime.¹⁷ EVH suggests, for example, that the Bureau failed to comply with the *Memorandum Opinion and Order* by offering written direct testimony from witnesses EVH deems "friendly" to Maritime such as Sandra DePriest, John Reardon, Tim Smith, and Patrick Trammell.¹⁸ However, there is nothing in the *Memorandum Opinion and Order* that requires the Bureau to present evidence at the hearing on Issue (g) that opposes Maritime or that precludes the Bureau from relying on the testimony of any particular witness. Notably, EVH fails to cite anything in the *Memorandum Opinion and Order* suggesting that the Bureau was so directed. Indeed, it would be improper for a Presiding Judge to dictate to the Bureau (or any other party) the positions it should take in its direct case or the evidence it should rely upon to construct its case. More fundamentally, EVH has no role in deciding what substantive positions the Bureau will take, which witnesses the Bureau may consider "friendly" or "unfriendly," or what evidence the Bureau chooses to rely upon.

9. EVH further challenges, as a violation of the *Memorandum Opinion and Order*, the Bureau's purported failure to explain how it can rely on testimony from Sandra DePriest, John Reardon, Tim Smith, and Patrick Trammell at this juncture and then later prosecute a

¹⁶ See, e.g., EB Exhibit Nos. 42, 56, 63, 69 and 95 on the index for the Bureau's Direct Case Exhibits (Public Version). See also EB Exhibit Nos. 1B, 1E, and 1G (the written direct testimony of Patrick Trammell, Lee Pillar, and Larry Allen).

¹⁷ See, e.g., EVH Motion at 5-6.

¹⁸ See, e.g., *id.* at 6.

revocation hearing on Maritime's basic qualifications. EVH erroneously suggests that because the Bureau is relying on these witnesses' testimony as it relates to the singular issue of the permanent discontinuance of 16 site-based stations licensed to Maritime, it cannot later cross-examine these same witnesses at a separate hearing on the remaining Issues in the HDO. Once again, there is nothing in the *Memorandum Opinion and Order* (and EVH cites nothing) that requires the Bureau to explain its reliance on these witnesses. More importantly, there is no rule or precedent – and again EVH cites none – that would preclude the Bureau from cross-examining Sandra DePriest, John Reardon, Tim Smith, or Patrick Trammell at a later hearing on separate Issues.

10. EVH's accusation that the Bureau's direct case was filed "in blatant disregard of the Presiding Judge's Order"¹⁹ because it relies on the testimony of Sandra DePriest, John Reardon, Tim Smith, and Patrick Trammell is, therefore, plainly unfounded and should be rejected.

The Bureau Did Not Improperly Adduce New Evidence After The Close Of Discovery

11. EVH also argues that the Bureau improperly adduced new evidence after the close of discovery in the form of written direct testimony from Maritime, Choctaw Telecommunications, LLC and Choctaw Holdings (Choctaw), and Maritime's lessees.²⁰ As a result, EVH accuses the Bureau of violating the Presiding Judge's discovery-related orders.²¹ However, EVH has not cited anything specific in the Bureau's written direct testimony submissions that was not – or could not have been – derived from the discovery that had been taken in this case. Nor has EVH demonstrated how the Bureau's written direct testimony

¹⁹ *Id.* at 4.

²⁰ *See, e.g., id.* at 9-10.

²¹ *See id.* at 9.

submissions “recast and reformulate[d] the facts, after the Bureau elicited the facts ... in interrogatories and depositions.”²² EVH has also failed to point to anything in the Bureau’s written direct testimony submissions that EVH requested during the discovery process and was denied.²³

12. In any event, EVH (again) fails to cite a single Commission rule or precedent that would preclude the Bureau from working with witnesses who support the Bureau’s case in presenting their direct testimony, whether or not they had been previously subjected to discovery requests. Indeed, litigators commonly gather evidence without having to invoke formal discovery tools such as interrogatories, and this practice is both efficient and entirely lawful. Indeed, EVH itself apparently worked “behind closed doors”²⁴ with individuals who support its case and from whom discovery was not taken in this case in preparing its written direct testimony submissions (*e.g.*, Peter Harmer, Fred Goad, and Steve Calabrese). EVH offers no explanation for why such activity would be proper on its part, but not on the Bureau’s. Thus, EVH again fails to offer any basis for striking the Bureau’s direct case.

EVH Offers No Specific Objections to the Bureau’s Direct Case Exhibits

13. EVH does not proffer any individual objections to the Bureau’s direct case exhibits. Instead, EVH asserts only that because the Bureau’s written direct testimony should be stricken, there is no testimony through which the Bureau can introduce its exhibits.²⁵ On that

²² *Id.*

²³ Pursuant to the terms of the *Protective Order*, Mr. Havens is not entitled to review unredacted portions of the Bureau’s written direct testimony designated as “Confidential” or “Highly Confidential.” *See, e.g., Protective Order*, FCC 11M-21 (ALJ, rel. Jul. 20, 2011) at ¶ 2(a)(ii); *see also id.* at ¶ 2(a)(i). Because counsel for ENL-VSL has refused to execute the *Protective Order*, he too is precluded from having access to this testimony. *See, e.g., ENL-VSL Request for Clarification and Relief Regarding the Protective Order and Mobex Documents*, filed Sept. 12, 2014; *see also Order*, FCC 12M-7 (ALJ, rel. Jan. 27, 2012) at 2, and *Order*, FCC 12M-20 (ALJ, rel. Mar. 19, 2012) at 2.

²⁴ EVH Motion at 10.

²⁵ In making this blanket assertion for all of the Bureau’s direct case exhibits, EVH also appears to be challenging the admissibility of exhibits which have been designated as “Confidential” or “Highly Confidential” and which, as

basis alone, EVH moves to strike all of the Bureau's direct case exhibits.

14. As demonstrated above, however, EVH's Motion regarding the Bureau's witnesses amounts to nothing more than unsubstantiated accusations which form no basis upon which to strike the Bureau's written direct testimony. As a result, there is similarly no basis to strike the Bureau's direct case exhibits. Moreover, by failing to provide specific objections to any of the Bureau's exhibits, EVH has waived the right to raise any additional objections to their admissibility.

The Bureau's Direct Case Should Be Admitted In Its Entirety

15. EVH hinges its objections to the Bureau's direct case entirely on its Motion to Strike. EVH has not submitted any challenges to individual Bureau direct case exhibits or to individual statements in the Bureau's written direct testimony.²⁶ As EVH's Motion fails to present any colorable basis to strike the Bureau's direct case exhibits or written direct testimony, and EVH offers no other objections, the Bureau respectfully requests that its entire direct case be admitted.

such, cannot be reviewed by EVH. *See supra* n.23. Indeed, the Bureau did not serve EVH with a copy of the "Confidential" or "Highly Confidential" exhibits. It defies logic that EVH raises objections to the admissibility of evidence it is not in a position to review and has not reviewed.

²⁶ As with the Bureau's direct case exhibits, EVH has waived the right to raise any additional objections to the Bureau's written direct testimony.

Respectfully submitted,

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October 31, 2014

CERTIFICATE OF SERVICE

Alicia McCannon, an Enforcement Analyst in the Enforcement Bureau's Investigations and Hearings Division, certifies that she has on this 31st day of October, 2014, sent by first class United States mail copies of the foregoing "ENFORCEMENT BUREAU'S OPPOSITION TO EVH'S MOTION TO STRIKE AND RESPONSE TO EVH'S OBJECTIONS TO THE BUREAU'S DIRECT CASE TESTIMONY AND EXHIBITS" to:

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